

No. 23-0704

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IN THE SUPREME COURT OF TEXAS

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Home Depot U.S.A.,  
*Petitioner,*

v.

Rogelio Santander Sr. and Julia Garcia, Individually and as  
Co-Administrators of the Estate of Rogelio Santander Jr.,  
and Crystal Almeida,  
*Respondent.*

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Original Proceeding  
From the 192<sup>nd</sup> Judicial District Court, Dallas County, Texas  
Cause No. DC-19-07132

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**BRIEF OF *AMICI CURIAE***  
**RETAIL LITIGATION CENTER, INC.,**  
**RETAIL INDUSTRY LEADERS ASSOCIATION, AND**  
**TEXAS RETAILERS ASSOCIATION IN SUPPORT OF**  
**HOME DEPOT U.S.A.'S PETITION FOR REVIEW**

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Pursuant to TEX. R. APP. P. 11(b), (c), counsel for *Amici Curiae* certify that the following is a complete list of the persons or entities on whose behalf this brief is filed and the person or entities paying for preparation of this brief:

1. *Amicus Curiae*, Retail Litigation Center, Inc.;
2. *Amicus Curiae*, Retail Industry Leaders Association; and
3. *Amicus Curiae*, Texas Retail Association.

Counsel for *Amici Curiae* are being compensated for the preparation of this *amici curiae* brief by *Amici Curiae*.

## STATEMENT OF INTEREST

This brief is filed on behalf of the Retail Industry Leaders Association (“RILA”), the Retail Litigation Center, Inc. (“RLC”), and the Texas Retailers Association (“TRA”) (collectively, “Amici Curiae”).<sup>1</sup> RILA is the United States trade association for retailers that have earned leadership status by virtue of their sales volume, innovation, or aspiration. RILA advances the industry through public-policy advocacy and promotes operational excellence and innovation. One of RILA’s most important programs is the Vibrant Communities Initiative, which is a public-private partnership to reduce unlawful activity and improve communities. RILA’s members include the largest and fastest growing companies in the industry—including retailers, product manufacturers, and service suppliers—together accounting for more than \$1.5 trillion in annual sales. RILA members provide millions of jobs and operate more than 100,000 stores, manufacturing facilities, and distribution centers.

The RLC is a 501(c)(6) nonprofit organization, a trade association of retailers and law firms dedicated to representing the interests of leading

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<sup>1</sup> No counsel for any party authored this brief in whole or in part, and no entity or person, other than Amici Curiae, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

retailers in the courts. The RLC's members employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC offers retail-industry perspectives to courts on important legal issues and highlights the industry-wide consequences of significant cases. Since its founding, the RLC has filed more than 200 amicus briefs on issues of importance to the retail industry. Its amicus briefs have been favorably cited by multiple courts, including the Supreme Court of the United States. *See, e.g., S.D. v. Wayfair, Inc.*, 585 U.S. 162, 184 (2018); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 542 (2013); *State of Tenn. v. Welch*, 595 S.W.3d 615, 630 (Tenn. 2020).

The TRA is an association of global, national, state, and local retail businesses dedicated to improving the lives of the consumers who power the Texas economic engine. The TRA supports industry through government advocacy and educational programs.

Amici Curiae and their members have a significant interest in the outcome of this case. Nearly all of their members operate retail locations in Texas and around the United States. Amici Curiae's members prioritize the safety of their customers and employees, and they are concerned that

the outcome of this litigation could lead to harmful unintended consequences. Thus, this Court’s decision to review the case will significantly affect *Amici Curiae* and its members.

### **BRIEF STATEMENT OF FACTS**

Dallas Police Officer Chad Seward served as a private security guard when he was off duty. *Santander v. Seward*, No. 05-21-00911-CV, 2023 WL 4576015, at \*6 (Tex. App.—Dallas July 18, 2023, pet. filed) (“COA Op.”). On the day in question, Seward was working as a security guard at Home Depot when he was asked to issue a criminal trespass warning to Armando Luis Juarez based on Juarez’s suspicious activity in the store. *Id.* at \*6–7. Seward brought Juarez to an asset-protection office at Home Depot. *Id.* at \*7. The parties dispute whether Seward frisked Juarez before detaining him. *Id.* at \*8. Once in the asset-protection office, Seward called the Dallas Police Department dispatch and requested a warrant search for Juarez. *Id.* Seward also asked the Department to send a cover element of on-duty police officers to the store. *Id.* Officers Rogelio Santander Jr. and Crystal Almeida responded to Seward’s call and entered the office where Juarez was held. *Id.* at \*9. Seward then went to the officers’ patrol car to use their laptop for the warrant search. *Id.* Upon verifying that Juarez had an

outstanding arrest warrant, Seward relayed this information to Home Depot employee Scott Painter, who was with the officers and Juarez. *Id.* When Almeida approached Juarez to take him into custody, Juarez pulled a firearm from one of his pockets and shot Santander, Almeida, and Painter. *Id.* Santander did not survive. *Id.*

### **RELEVANT PROCEDURAL HISTORY**

Home Depot filed a traditional and no-evidence motion for summary judgment in the trial court. CR 407–581. The trial court entered summary judgment in favor of Home Depot, dismissing all of Plaintiffs’ claims against it. CR 861–69. The Court of Appeals reversed the trial court on multiple claims, including Plaintiffs’ claims sounding in negligence and premises liability. COA Op. at \*28.

### **SUMMARY OF ARGUMENT**

This important case asks whether Texas courts should require retailers “to [essentially] provide the same level of security that airports enlist to prevent terrorism.” *Trammell Crow Cent. Tex., Ltd. v. Gutierrez*, 267 S.W.3d 9, 19 (Tex. 2008) (Jefferson, C.J., concurring). “Life in a free society carries a degree of risk. That risk can be virtually eliminated by a pervasive military presence, but the burdens—both in terms of the

economic cost to premise owners and in the oppressive climate a police state spawns—would be prohibitive.” *Id.*

The Court of Appeals arbitrarily heightened the duty of care Texas retailers owe to responding police officers who are injured on their premises. If left unchanged, the Court’s opinion would hinder public safety measures at stores across the State and create confusion about the duties owed to emergency responders.

## **ARGUMENT**

### **I. The Court of Appeals Established a New, Heightened Duty of Care for Texas Retailers.**

Contrary to decades of precedent, the Court of Appeals created a new, heightened duty of care that retailers owe to police officers who arrive on business premises in response to criminal activity or threats to public safety. According to the Court of Appeals, the heightened duty applies to claims that sound in premises liability and negligence.

#### **A. Premises Liability: The Court of Appeals Viewed the Officers as Invitees in Contravention of the Firefighter’s Rule.**

In any premises liability case, “the duty an owner or occupier of property owes someone on the property depends on that person’s status.” *Cath. Diocese of El Paso v. Porter*, 622 S.W.3d 824, 829 (Tex. 2021). A

licensee is one “who goes on the premises of another merely by permission, express or implied, and not by any express or implied invitation.” *Id.* (citing *Tex.-La. Power Co. v. Webster*, 127 Tex. 126, 91 S.W.2d 302, 306 (1936)). In contrast, an invitee is a person “who enters the property of another with the owner’s knowledge and for the mutual benefit of both.” *Id.* (citing *Austin v. Kroger Tex., L.P.*, 465 S.W.3d 193, 202 (Tex. 2015)). The duty owed to an invitee is higher than the duty owed to a licensee. *See id.* Premise owners or occupiers owe a licensee the duty “to warn . . . or make reasonably safe, a dangerous condition on which the owner is aware of and the licensee is not.” *Id.* (citations omitted). However, when someone is classified as an invitee, premise owners or occupiers have a heightened duty “to protect against danger from a condition on the land that creates an unreasonable risk of harm of which the owner or occupier knew *or by the exercise of reasonable care would discover.*” *Id.* (emphasis added) (citation omitted).

Under well-established Texas common law, premises owners or tenants (including retailers like Home Depot) owe the same legal duties to public-safety officers as “the duties owed to an ordinary licensee, including the duty to warn of known, dangerous conditions.” *Thomas v. CNC Invs.*,



*L.L.P.*, 234 S.W.3d 111, 120 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (citations omitted); see *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 788 (Tex. 2010) (J. Wainwright, dissenting) (“The common law has recognized for a long time that the basis of a premises liability claim is a physical defect or condition on property.”). “Under the common-law ‘firefighter’s rule,’ . . . police officers are barred from recovering in premises-liability cases for injuries that result from risks inherent in responding to an emergency if the injuries are caused by only ordinary negligence.” *Thomas*, 234 S.W.3d at 120. “The purpose of the rule is to limit the recovery of . . . police officers so that citizens will not be discouraged from relying on the skill, training, and expertise of these public servants.” *Id.*

The Court paid lip service to the firefighter’s rule, but effectively treated the officers as invitees owed a higher duty of care, in violation of that doctrine. Specifically, the Court of Appeals concluded that there is “a genuine fact issue whether Home Depot was aware of a dangerous condition that the officers were not and Home Depot failed to warn the officers” and that “detaining Juarez without having searched him constituted a dangerous condition[.]” COA Op. at \*22. This holding directly

contradicts the firefighter's rule because the duty to investigate the premises and protect officers from danger is a duty owed to an invitee, not a licensee. *Porter*, 622 S.W.3d 824 at 829.

By treating the officers as invitees, the Panel required Home Depot “to exercise reasonable care to protect against danger from a condition on the land that creates an unreasonable risk of harm of which [Home Depot] knew or by the exercise of reasonable care would discover.” *See id.* Holding Home Depot to such a high duty of care for police officers significantly expands the duties that Texas retailers owe to law enforcement officials and other public servants who respond to calls for help. As a result, retailers across Texas could be held liable for not affirmatively seeking out dangerous conditions of which they were otherwise unaware and warning police officers about those conditions.

For instance, the Court of Appeals defined the dangerous condition here as “detaining Juarez without having searched him[.]” COA Op. at \*22. The Panel stated that because Home Depot's employee Painter did not see Juarez searched while he was in the store, Home Depot knew that Juarez had not been searched for weapons before the officers arrived and therefore “knew” of a dangerous condition. COA Op. at \*21.

But Texas courts have never imposed an affirmative duty on businesses to search their customers for weapons or to assume unsearched individuals are “dangerous.”<sup>2</sup> Imposing a duty upon retailers to frisk or search every suspected shoplifter prior to calling law enforcement would not be reasonable and would raise its own extensive set of problems, including potential for injury to store employees and customers. While the Court had the advantage of viewing the facts in hindsight, the record is clear: no one knew Juarez had a gun until he pulled the gun from his pocket and fired it. *Id.* at \*1. And contrary to the Panel’s conclusion, the unknown **gun** was the dangerous condition, not the failure to search. *See Wal-Mart Stores, Inc. v. Miller*, 102 S.W.3d 706, 709 (Tex. 2003) (holding while licensors must warn of known dangerous conditions, “[i]f the licensee has the same knowledge about the dangerous condition as the licensor, then no duty to the licensee exists”).

The firefighter’s rule was created to enable citizens to rely on the expertise of public servants. However, this deviation from longstanding Texas precedent effectively excludes retailers from the category of citizens

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<sup>2</sup> After a diligent search, undersigned counsel could not locate any cases or statutes *requiring* private businesses to search customers for weapons.

who can reasonably rely on these public servants, without being liable for unforeseen injuries. Moreover, by classifying on-duty police officers as invitees, the Panel’s decision adds a layer of ambiguity to premises liability claims, casting doubt on what duty of care retailers owe to responding officers.

**B. Negligence: The Court of Appeals Required Home Depot to Perform Tasks Traditionally Left to Police Officers in Order to Meet its Duty of Care.**

The Court *required* Home Depot to search and restrain Juarez in order to satisfy its duty of care under a negligence analysis. But these tasks are traditionally performed by law enforcement professionals, not private businesses. As a four-justice concurrence of this Court noted, “the Court must determine whether giving a jury the option to require premise owners to insure against brazen criminal attacks appropriately shifts law enforcement to the private sector.” *Gutierrez*, 267 S.W.3d 9, 18 (Tex. 2008) (Jefferson, C.J., concurring). The Court of Appeals’ holding could effectively require retailers to take extreme security measures, and these measures may still fall short of the high bar created by the Court of Appeals.

The lower court determined that there was “evidence that Home Depot acted negligently by actively detaining Juarez and keeping him on

the premises without adequately searching him for weapons or restraining him so that he could not injure others.” COA Op. at \*19. Implicit in this finding is the assumption that Home Depot had a legal duty to search Juarez for weapons or physically restrain him to prevent him from injuring the officers. Because, if Home Depot did not owe this duty, then it could not be negligent on these facts as a matter of law. *Kroger Co. v. Elwood*, 197 S.W.3d 793, 794 (Tex. 2006) (“Whether a duty exists is a threshold inquiry and a question of law; liability cannot be imposed if no duty exists.”). Yet, the Court does not explain why Home Depot owes such a duty or how such a duty would be reasonable for a retailer to assume. Such a heightened duty of care is inconsistent with both societal norms recognizing the superior expertise of law enforcement in matters of public safety and the common law duties imposed on Texas retailers.

Never have Texas retailers been held to such a high duty of care when they call police officers to their stores to assist with potential threats to public safety.<sup>3</sup> In fact, the Court freely admits that “[w]e have not found any cases closely on point.” COA Op. at \*19. By raising the standard of care

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<sup>3</sup> Notably, the courts should not be the first to impose such a stringent duty on retailers that essentially requires “airport-level” security at all stores across the State. Such a dramatic shift in legal duties and social norms should be reserved for debate in the Legislature, not the quill of the Court.

owed to police officers by Home Depot, the Court's decision now requires retailers to take affirmative action to investigate all potential dangers and either neutralize those threats or warn the responding officers of the safety risks that would otherwise be inherent in their job. *See e.g., Thomas*, 234 S.W.3d at 121 (finding getting shot and run over was an inherent risk of a police officer who was responding to an emergency where a suspect was evading arrest). In doing so, the Court's decision creates an unprecedented burden on retailers to engage in police-like conduct or risk civil liability for failing to meet the duty of care owed to responding officers. Texas law has never imposed such an onerous burden on businesses.

## **II. Retailers Should Be Able to Rely on Local Law Enforcement to Neutralize Potential Threats to Public Safety.**

Retailers are experts in selling goods and services to the general public. While retailers strive to deliver a pleasant and safe shopping experience and may partner with agencies and organizations to promote vibrant communities, they are not law enforcement experts. Therefore, retailers rely on local law enforcement for their expertise in de-escalating potential threats when faced with dangerous situations, such as frequent shoplifters or individuals displaying aggressive behavior. Even those with

security guards, including off-duty police officers, often require the support of on-duty officers when confronting such threats.

While retailers achieve excellence in their field by satisfying customers through the provision of goods and services, law enforcement officers are trained and equipped to handle public safety concerns, particularly in situations requiring apprehension and custody of suspects. *See MacDonald v. PKT, Inc.*, 464 Mich. 322, 335 (2001) (“[i]t is unjustifiable to make merchants, who not only have much less experience than the police in dealing with criminal activity but are also without a community deputation to do so, effectively vicariously liable for the criminal acts of third parties.”). In Texas, the Texas Commission on Law Enforcement (“TCOLE”) sets minimum standards for the training and licensure required to become a Texas peace officer. TEX. OCC. CODE § 1701.301. By TCOLE’s standards, police officers learn how to weigh safety options and tactical resources when approaching potentially dangerous individuals. *See Basic Peace Officer Course 736*, TEX. COMM’N ON LAW ENF’T, available at, <https://tcole.texas.gov/course-curriculum-materials-and-updates> (last visited May 3, 2024). Further, police officers learn key provisions of the

Texas Penal Code and legal nuances such as probable cause, reasonable suspicion, *Miranda* rights, and custodial statements. *Id.*

Despite retailers' commercial (rather than policing) purpose, the Court of Appeals shifted the burden and placed the responsibility for public safety on retailers. But it is the police officers, not retailers, who are highly skilled and extensively trained in neutralizing threats to public safety. Not only would this create an unprecedented legal standard of care, but such a standard ignores the practical reliance retailers and the public have on law enforcement. Expecting retailers to perform tasks reserved for trained law enforcement professionals could lead to inadequate responses or even exacerbate dangerous situations.

Retailers should be able to rely on and trust the expertise of law enforcement officers who are called to assist with public safety concerns and potentially dangerous suspects on a retailer's premises. This approach upholds existing legal standards of care and aligns with the expectations of both retailers and the public regarding law enforcement's role in protecting communities from harm.



## CONCLUSION

By heightening the duty owed to public servants, the Court of Appeals widely expanded civil liability exposure for Texas retailers who call police officers to handle threats to public safety in their stores. This new standard of care is a clear departure from the firefighter's rule, and it asks retailers to step outside of their role as providers of consumer goods and services and into the role of law enforcement.

*Amici Curiae* respectfully urge this Court to grant Home Depot's petition for review and reverse the Court of Appeals.

Respectfully submitted,

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I hereby certify that this Brief of Amici Curiae was prepared using Microsoft Word 2010, which indicated that the total word count (exclusive of those items listed in TEX. R. APP. P. 9.4(i)(1)) is 2,999 words.

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**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing document was served upon all counsel of record on July 2, 2024 via the Court's electronic filing system.

*/s/ Randall W. Miller* \_\_\_\_\_  
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Scotty Palmer	797196	scott@palmerperlstein.com	7/2/2024 3:13:29 PM	SENT
Sean Cox	24031980	scox@coxappellate.com	7/2/2024 3:13:29 PM	SENT
Grant Gerleman	24083065	grant.gerleman@palmerperlstein.com	7/2/2024 3:13:29 PM	SENT
James Roberts	24105721	james@scottpalmerlaw.com	7/2/2024 3:13:29 PM	SENT
Randall Miller		RWMiller@munsch.com	7/2/2024 3:13:29 PM	SENT
Isabelle Hutchinson		ihutchinson@munsch.com	7/2/2024 3:13:29 PM	SENT
Stephanie Glenn		sglenn@munsch.com	7/2/2024 3:13:29 PM	SENT
Kelsey Kraner		KKraner@munsch.com	7/2/2024 3:13:29 PM	SENT
C. Timothy Reynolds		timreynolds@steadlawfirm.com	7/2/2024 3:13:29 PM	SENT
Shelly McCart		shelly@palmerperlstein.com	7/2/2024 3:13:29 PM	SENT
Emily Means		EMeans@munsch.com	7/2/2024 3:13:29 PM	SENT

Associated Case Party: Home Depot U.S.A., Inc.

Name	BarNumber	Email	TimestampSubmitted	Status
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KKraner@munsch.com  
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Filing Code Description: Amicus Brief  
Filing Description: Retail Litigation Center's Amicus Brief in Support of Home Depot's PFR  
Status as of 7/2/2024 3:22 PM CST

Associated Case Party: Home Depot U.S.A., Inc.

Name	BarNumber	Email	TimestampSubmitted	Status
Arthur Smith	18534100	asmith@aksmithlaw.com	7/2/2024 3:13:29 PM	SENT

Associated Case Party: Point 2 Point Global Security, Inc.

Name	BarNumber	Email	TimestampSubmitted	Status
Priyanka Thomas		pthomas@katxlaw.com	7/2/2024 3:13:29 PM	SENT
Angie Fisher		afisher@kaktxlaw.com	7/2/2024 3:13:29 PM	SENT
E-Service KAK		e-service@kaktxlaw.com	7/2/2024 3:13:29 PM	SENT
David Walsh		dwalsh@katxlaw.com	7/2/2024 3:13:29 PM	SENT